

No. 12882

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United States  
Court of Appeals  
for the Ninth Circuit.

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ROBERT C. NORMAN,

Appellant,

vs.

SPOKANE - PORTLAND & SEATTLE RAIL-  
WAY CO., a Corporation,

Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the District of Oregon.

FILED

APR 30 1895

PAUL J. TURNER



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States  
for the District of Oregon

No. Civ. 4090

ROBERT O. NORMAN,

Plaintiff,

vs.

SPOKANE - PORTLAND & SEATTLE RAIL-  
WAY CO., a Corporation,

Defendant.

### OPINION

January 16, 1950

James Alger Fee, District Judge:

Norman, according to the agreed facts, was an employee of Gilpin Construction Company, an established private corporation engaged in contracting and construction work of a general nature, including from time to time bridge and trestle repairs for railroads, among which was the defendant Spokane-Portland & Seattle Railway Co., a common carrier of persons and of property in interstate commerce. Gilpin had not rejected the Oregon Workmen's Compensation Act, and regularly made contributions to the State Industrial Accident Commission on behalf of all its employees. The Rockton Bridge of the railroad fell into disrepair. A contract was entered into between Gilpin and the railroad for the repair thereof. During the work, Norman was seriously injured by a fall from a scaffold, which he alleges was improperly pro-

tected. For this injury, he brought action under the Federal Employers' Liability Act, upon the theory that the railroad is under a nondelegable duty to perform such work by its own employees and is therefore liable to any workman injured thereon. It was originally asked by plaintiff that the cause be tried by jury. However, the issues were finally submitted, both as to fact and law, to the Court.

There was an amended pretrial order drawn after conference, which practically reduced the case to the solution of the following question of law:

“Where a railroad corporation engaged in interstate commerce contracts with an independent contractor for the construction, repair and maintenance of the railroad company's bridges and trestles used in interstate commerce, is it relieved from liability in damages under the Federal Employers' Liability Act for injuries to employees of the independent contractor occurring during the course of such work and caused by the independent contractor's negligent failure to provide a safe place and suitable equipment to the employees for such work?”

The cause was submitted upon the transcript of evidence taken in a similar case in the state court and the agreements contained in stipulations and in the pretrial order. It is agreed that Gilpin was in fact a truly independent contractor acting under a bona fide contract with the railroad, which was not designed or intended as a scheme or artifice to evade the provisions of the Federal Employer's

Liability Act. It is stipulated that the 1939 amendment of the Federal Employers' Liability Act has "no bearing on who are 'employees' of a railroad" under the Act. The parties have likewise agreed that the following decisions do not bear on the basic issue and may be disregarded:

"1. Decisions as to whether the work being performed by a particular railroad employee at the time of injury was within interstate commerce so as to vest jurisdiction of the action in federal courts.

"2. Decisions holding that particular factual situations by common law tests constituted the parties employer-employee rather than independent contractor-contractee.

"3. Decisions under the Railroad Retirement Act, Fair Labor Standards Act and Social Act where the question presented is whether an employee is engaged in interstate commerce within the scope of the particular legislation and/or whether the employee falls within the coverage of said legislation or is otherwise within the scope of such legislation, including that of the relationship of employer-employee."

The Court therefore finds the facts as agreed in the amended pretrial order. Particularly, the Court finds as a fact that Norman was an employee of Gilpin and not an employee of defendant. The Court also finds that Norman was acting under the direction and control of Gilpin and not of defend-

ant. Gilpin had unrestrained power to direct the manner and method of doing the work and the choice of its own employees. There was actually no attempt to delegate any responsibility by defendant, but simply a normal transaction of letting repair work to an independent contractor.

The Court is of opinion that a railroad company may employ a contractor to repair bridges. The duty of the railroad company to keep such transportation facilities in reasonable repair is not non-delegable so far as employees of the independent contractor are concerned. Here the independent contractor had been in business for many years and was covered under the Workmen's Compensation Act.

Of the hundreds of cases which have been reviewed by the Court, none suggests that an employee of a true independent contractor erecting or repairing a bridge on a right of way becomes an employee of the railroad company because the duty of construction and repair of such bridges cannot be delegated. No case suggests that the employee of an independent contractor becomes an employee *pro hac vice* under such circumstances. In view of the history of such construction by independent contractors ever since railroads have been in existence, it is necessary to answer that the employees of the contractor do not become employees of the railroad by any legal theory. This does not derogate from the duty of the railroad to construct and repair such structures. But the duty is not to plaintiff but to its passengers. If there were a

question of control of the operation by the railroad, a possibility exists that liability of the railroad might be worked out. But the parties have entered the following stipulation, which disposes of this basis of liability as well as many others:

“It is agreed by the parties that the Amendment to the Pretrial Order poses for this Court’s determination a single question:

“May a railroad delegate to an independent contractor the work of repairing, renewing and maintaining its tracks and bridges in the sense that the employees of an independent contractor who are injured in such work are not employees of the railroad within the scope and meaning of the Federal Employers’ Liability Act?”

The claim of Norman for this accident was allowed by the State Industrial Accident Commission. In view of the modern policy of administrative compensation for accidents, it would seem that no distinction should be created between construction work done by this established contractor in building a railroad bridge and in building an office tower. Just because his employer happened by chance to be building a railroad bridge instead of an office building is no reason for permitting plaintiff to gamble upon the windfall of a heavy verdict or the disaster of no recovery simply because he was incidentally working on railroad bridge construction. Nor, on the other hand, is it sound public policy, if he lost in such a gamble, to permit him to fall back

into the safety net of the Workmen's Compensation Act.

The question submitted is decided in the affirmative, and the action is dismissed.

[Endorsed]: Filed February 10, 1950.

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[Title of District Court and Cause.]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on regularly for trial before the undersigned, Chief Judge of this Court. Plaintiff appeared in person and by Elton Watkins, his attorney. Defendant appeared by Hugh L. Biggs and George H. Fraser of its attorneys.

By agreement of the parties the issue of defendant's liability was segregated for separate trial by the Court sitting without a jury. Testimony and evidence were offered by each of the parties and received by the Court and the case was submitted upon the parties' oral arguments and written briefs. Concerning the issue of plaintiff's right to maintain this action against defendant, the parties, after the case had been submitted, filed the following stipulation:

"It is agreed by the parties that the Amendment to the Pretrial Order poses for this Court's determination a single question:

May a railroad delegate to an independent contractor the work of repairing, renewing and

maintaining its tracks and bridges in the sense that the employees of an independent contractor who are injured in such work are not employees of the railroad within the scope and meaning of the Federal Employers' Liability Act?

### Plaintiff's Contention

Plaintiff contends that the railroad is under a nondelegable duty to perform such work by its own employees and therefore is liable to any workman negligently injured in the performance thereof under the terms and provisions of the Federal Employers' Liability Act, irrespective of whether the railroad employed and directed the workman or an independent contractor with the railroad employed and directed such workman at the time of the accident.

### Defendant's Contention

Defendant contends that a railroad has no liability under the Federal Employers' Liability Act for injuries, not occasioned by the railroad's negligence, to an employee of an independent contractor with the railroad, engaged in repairing, renewing and maintaining the railroad's bridges and tracks, and that the Federal Employers' Liability Act therefore does not prohibit the delegation of such work by a railroad to an independent contractor.

With the issue on this phase of liability being thus limited, the parties agree that the following subsidiary issues are now eliminated:

1. Whether the Gilpin Construction Company was a true independent contractor or simply an agent or servant of the SP&S.

It is stipulated in the Amendment to the Pretrial Order that Gilpin Construction Company was in fact a true independent contractor.

2. The effect of the 1939 amendment to the Federal Employers' Liability Act.

It is stipulated that this amendment was designed to broaden the concept of interstate commerce as applied to various job categories in the maintenance and operation of railroads. It has no bearing on who are "employees" of a railroad as that term is used in the Federal Employers' Liability Act.

3. Whether the contract was a scheme to evade the liabilities of the railroad under the provisions of the Federal Employers' Liability Act.

The parties agree that the contract between the defendant and Gilpin Construction Company was a bona fide contract not designed or intended as a scheme or artifice to evade the provisions of the Federal Employers' Liability Act.

The parties further agree that the following class of decisions do not bear on the basic issue as above defined and therefore may be disregarded by the Court:

1. Decisions as to whether the work being performed by a particular railroad employee at the time of injury was within interstate commerce so as to vest jurisdiction of the action in federal courts.

2. Decisions holding that particular factual situations by common law tests constituted the parties employer-employee rather than independent contractor-contractee.

3. Decisions under the Railroad Retirement Act, Fair Labor Standards Act and Social Security Act where the question presented is whether an employee is engaged in interstate commerce within the scope of the particular legislation and/or whether the employee falls within the coverage of said legislation or is otherwise within the scope of such legislation, including that of the relationship of employer-employee.

The parties reserve the right to comment orally or by memorandum on the authorities which they regard pertinent to the single issue posed by the Amendment to the Pretrial Order.”

The Court having considered all matters of fact and law presented by the parties touching the issue, and now being fully advised, makes the following

### Findings of Fact

#### I.

During all times herein material plaintiff was a resident of the State of Washington, residing with his family at Vancouver, Washington.

#### II.

During all times herein material defendant was and is a corporation existing by virtue of the laws of the State of Washington, and is now and at all

times herein material has been engaged as a common carrier by railroad in the transportation of persons and property within and between the States of Oregon and Washington. A part of its railroad track was on a certain trestle near Rockton, Oregon, known as "Rockton Bridge," which was owned and used by defendant in its interstate business. It was the duty of defendant to maintain its railway lines and its roadbed, tracks and bridges in a reasonably safe condition for its use in interstate commerce.

### III.

Gilpin Construction Company during all of the times and dates material herein was a private corporation organized and existing under and by virtue of the laws of the State of Oregon, and was and for many years had been engaged in a general contracting business, including the construction, maintenance and repair of railroad trestles and bridges. It was and is a wholly independent corporation, in which neither the defendant nor any of its affiliates own or control any stock or interest whatsoever.

### IV.

On or about the 7th day of October, 1944, Gilpin Construction Company, hereinafter referred to as "Gilpin," entered into a contract with defendant whereby for a sufficient consideration it undertook and agreed to do repair and maintenance work on defendant's trestles and bridges, including Rockton Bridge, and to furnish the equipment, tools and labor necessary to do that work.

## V.

The relationship established by said contract and existing between Gilpin and the Railroad Company by virtue of said contract and the performance of the contracting parties thereunder at the time of the accident and resulting injury to plaintiff hereinafter mentioned was that of true independent contractor and contractee. Gilpin at all times material to this controversy was in fact a true independent contractor acting under a bona fide contract with defendant, which contract was not designed or intended as, and in fact was not, a scheme or an artifice to evade the provisions of the Federal Employers' Liability Act.

## VI.

On and prior to January 10, 1947, plaintiff was employed by and working for Gilpin as a member of one of its construction crews which was engaged on that day in the work of repairing and enlarging Rockton Bridge. While so employed the scaffolding upon which plaintiff was standing gave way and caused him to fall to the ground, a distance of between 60 and 70 feet below the place where he had been working. As a result plaintiff sustained serious injuries to his person which incapacitated him for a long period of time and required prolonged hospital treatment and medical care.

## VII.

At the time of the accident above mentioned, and for a long time prior thereto, plaintiff was and had been employed by Gilpin and was acting under the direction and control of Gilpin and not of the

defendant. Gilpin had unrestrained power to and did direct the manner and method of doing the work of repairing and maintaining the Rockton Bridge and to choose its employees. Defendant made no attempt to delegate any of its responsibility to Gilpin but by its contract with Gilpin simply entered into a normal transaction of letting necessary repair work to an independent contractor.

### VIII.

Gilpin during all the times material to this controversy was engaged in a hazardous occupation, had not rejected the Workmen's Compensation Act of the State of Oregon but had made and was making contributions regularly to the Industrial Accident Commission on behalf of all of its employees, and was contributing regularly on behalf of the plaintiff in this case as one of its employees, and at all times was in good standing with the said Commission under the provisions of the Workmen's Compensation Act.

### IX.

Following the accident plaintiff, as an employee of Gilpin, applied for and received medical, rehabilitation, and compensation benefits provided by the Workmen's Compensation Act of the State of Oregon from the State Industrial Accident Commission.

### X.

The parties have stipulated and the Court finds that this action is brought under the Federal Employers' Liability Act, Title 28, U.S.C.A., Section

51, et seq., and plaintiff's right to maintain the action is to be determined solely in accordance with the provisions of the Federal Employers' Liability Act.

From the foregoing the Court draws the following

### Conclusions of Law

#### I.

Plaintiff may not maintain this action against defendant under the provisions of the Federal Employers' Liability Act because he was not an employee of defendant within the meaning of said act.

#### II.

Plaintiff was employed by and working for Gilpin, an independent contractor, at the time of the accident and injury of which he complains herein.

#### III.

The contract between defendant and Gilpin, pursuant to which the work resulting in plaintiff's injury was being performed, was not designed or intended as, and in fact was not, a scheme or an artifice to evade the provisions of the Federal Employers' Liability Act.

#### IV.

A railroad, even though engaged in the transportation of persons and property in interstate commerce and subject to the provisions of the Federal Employers' Liability Act, may delegate to an independent contractor the work of repairing,

renewing and maintaining its tracks and bridges used in its interstate business in the sense that the employees of an independent contractor who are injured in such work are not employees of the railroad within the scope and meaning of the Federal Employers' Liability Act.

## V.

Defendant has no liability under the Federal Employers' Liability Act for injuries not occasioned by its negligence to plaintiff as an employee of Gilpin, an independent contractor engaged in repairing, renewing and maintaining defendant's bridges and tracks, and the Federal Employers' Liability Act does not prohibit the delegation of such work by a railroad to an independent contractor.

## VI.

Plaintiff is not entitled to recover against defendant in this action. The action therefore should be dismissed and the defendant is entitled to judgment for its costs and disbursements incurred herein.

Done and dated at Portland, Oregon, this 9th day of March, 1951.

/s/ JAMES ALGER FEE,  
Chief Judge.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 9, 1951.

The United States District Court  
for the District of Oregon

Civil Action No. 4090

ROBERT O. NORMAN,

Plaintiff,

vs.

SPOKANE - PORTLAND & SEATTLE RAIL-  
WAY CO., a Corporation,

Defendant.

JUDGMENT ORDER

The Court having heretofore made and entered its findings of fact and conclusions of law herein in favor of defendant and against the plaintiff, and the case now coming on for judgment in accordance with said findings and conclusions, it is, therefore

Considered, Ordered and Adjudged that plaintiff take nothing by reason of this action, that this action be and the same is hereby dismissed, and that defendant have and it is hereby granted judgment against plaintiff for defendant's costs and disbursements herein, taxed at \$157.50.

Done and dated in open court this 9th day of March, 1951.

/s/ JAMES ALGER FEE,  
Chief Judge.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 9, 1951.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: The Clerk of the above-entitled Court, and

To: Spokane-Portland & Seattle Railway Co., a corporation, and

To: Hugh L. Biggs, George H. Fraser, and Hart, Spencer, McCulloch, Rockwood & Davies, Attorneys at Law for Appellee-Defendant.

You and each of you will please take notice that Robert O. Norman, the plaintiff above named, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit thereof from the Judgment Order made and entered on March 9, 1951, wherein the Court considered, ordered and adjudged that plaintiff take nothing by reason of this action and that the said action be, and the same is dismissed, and that defendant have judgment against plaintiff for defendant's costs.

Dated at Portland, Oregon, this 15th day of March, 1951.

/s/ ELTON WATKINS,  
Attorney for Plaintiff.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 15, 1951.

CLERK'S CERTIFICATE

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of opinion of the court, findings of fact and conclusions of law, judgment, notice of appeal, bond on appeal, designation of record, and transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 4090 in which Robert C. Norman is plaintiff and appellant, and the Spokane-Portland & Seattle Railway Co., a corporation, is defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 21st day of March, 1951.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy.

[Endorsed]: No. 12882. United States Court of Appeals for the Ninth Circuit. Robert C. Norman, Appellant, vs. Spokane-Portland & Seattle Railway Co., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed March 23, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 12882

ROBERT O. NORMAN,

Appellant,

vs.

SPOKANE - PORTLAND & SEATTLE RAIL-  
WAY CO., a Corporation,

Appellee.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT INTENDS TO RELY ON AP-  
PEAL AND DESIGNATION OF RECORD

Appellant herein, pursuant to Rule 19(6) of the Federal Rules of Civil Procedure, hereby designates the portions of the record to be contained on the record on appeal in this cause and the points on which appellant intends to rely on appeal.

1. Re — Designation of Record: Findings of Fact and Conclusions of Law and Judgment Order. Notice of Appeal and Clerk's Certificate.

2. Statement of points on which appellant intends to rely on appeal, to wit: The Court erred in entering the Judgment Order which is not supported by the Findings, that is to say:

(a) The District Court erred in holding that the duty imposed upon appellee to maintain its railway lines and its road bed, tracks and bridges in a reasonably safe condition for its use in interstate commerce was a delegable duty.

(b) The District Court erred in holding that appellant may not maintain this action against appellee under the provisions of the Federal Employers' Liability Act because he was not an employee of appellee within the meaning of said Act, but an employee of an independent contractor.

(c) The District Court erred in holding that appellee, even though engaged in transportation of persons and property in interstate commerce and subject to the provisions of the Federal Employers' Liability Act, may delegate to an independent contractor the work of repairing, renewing and maintaining its tracks and bridges used in its interstate business in the sense that the employees of an independent contractor who are injured in such work are not employees of the railroad within the scope and meaning of the Federal Employers' Liability Act.

(d) The District Court erred in entering its Judgment Order dismissing this action as said Judgment Order is not supported by the Federal Employers' Liability Act and the interpretations by the courts of said Act.

Dated at Portland, Oregon, this 29th day of March, 1951.

/s/ ELTON WATKINS,  
Attorney for Appellant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 30, 1950.